ATTACHMENT 7

New York Department of Corrections
Filed Objections to Outside Connection's
Motion for Preliminary Injunction

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: WORLDCOM, INC., et al.	:	
Debtors.	:	Case No. 02/13533 Chapter 11
OUTSIDE CONNECTION, INC.,	:	
Plaintiff,	:	Adversary Proceeding No. 02/8092A (AJG)
-against-	:	
MCI WORLDCOM and NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,	:	
Defendants.	:	

DEFENDANT NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES' OBJECTIONS TO PLAINTIFF OUTSIDE CONNECTION'S MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE ARTHUR J. GONZALEZ
UNITED STATES BANKRUPTCY JUDGE

Defendant New York State Department of Correctional Services ("DOCS"), by its attorney, Eliot Spitzer, Attorney General of the State of New York, submit these objections to plaintiff Outside Connection's motion for a preliminary injunction, based on the papers previously submitted and the affidavits of Edmund Koberger, DOCS Data Communications Specialist (Koberger Aff.), Clair Bee, DOCS Assistant Commissioner for Correctional Facilities (Bee Aff.), and Kenneth McLaughlin, Director of Operations for DOCS's Office of the Inspector General (McLaughlin Aff.):

SUMMARY OF OBJECTIONS

Plaintiff seeks to compel by judicial intervention a private business enterprise's interference with the safe and secure operation of the prisons of New York State. By law, DOCS inmates only have telephone access by placing collect calls to telephone numbers on a limited list. Call forwarding and third party calls are forbidden for security reasons. Plaintiff leases telephone numbers ostensibly to allow a person who would otherwise be the recipient of a long distance collect telephone call from an inmate to receive a local collect call. DOCS determined that this was a call forwarding service and, pursuant to its contractual agreement, ordered debtor WorldCom to block telephone calls placed to Outside Connection telephone numbers or the numbers of any similar service.

Because DOCS acted under the authority of the State of New York and WorldCom acted at its direction, plaintiff's Sherman Act and Clayton Act anti-trust claims are barred by the state action doctrine. Because the Federal Communications Commission has recognized the special needs of prison telephone systems and largely exempted them from laws and regulations requiring competition, plaintiff fails to state a claim under the Telecommunications Act of 1996. Because the contract between DOCS and WorldCom was in interstate commerce, plaintiff's claim under the Donnelly Act, NY Bus. Law §340 is inapplicable.

FACT SUMMARY.

1. DOCS operates 70 correctional facilities throughout New York State housing about 67,000 inmates. Bee Aff., ¶4.

2. In order to assist inmates efforts to communicate with their families or their attorneys, DOCS operates the Inmate Call Home Program pursuant to regulations, 7 NYCRR chap. 723. Pursuant to the regulations, inmates may only place collect calls to numbers on their calling list, which is limited to 15 telephone numbers. 7 NYCRR §723.5(a), (c). Currently, about 15,000 calls per day are completed through the Call Home Program and there are about 536,000 numbers on inmate lists. Koberger Aff., ¶3.

3. DOCS regulations prohibit the forwarding of telephone calls, and inmates may be subject to disciplinary proceedings for being involved in forwarded calls. See 7 NYCRR §§280.2 (Rule 121.11), 723.3(e)(11).

4. The Call Home Program was the result of a careful balancing of the desire to provide inmates with telephone access to friends and family against the need to keep inmates in a safe and secure environment and the need to protect the public from abuse. Bee Aff., ¶7.

5. To carry out the Call Home Program, DOCS entered into an agreement with MCI WorldCom Communications, Inc., as the sole provider of telephone services from DOCS facilities. Bee Aff., ¶5. WorldCom received a contract after placing the successful proposal

in response to a competitive bidding process. Koberger Aff., ¶4. See Request for Proposal dated August 15, 2000. The current agreement runs through March 31, 2006, but DOCS has options to extend it for two additional one year terms. Bee Aff., ¶5.

6. A single provider system assures that DOCS has consistent quality in both the service and security provided. Bee Aff., ¶¶8-9. Given the special equipment involved in monitoring phone calls and blocking unlawful calls, as well as the need for quick access to call data, a single provider system is the most cost efficient option. Koberger Aff., ¶8. It is also more efficient and cost effective for DOCS to handle data supplied by a single provider, than multiple providers. See Koberger Aff., ¶¶13-15.

7. In late July 2002, DOCS learned that plaintiff was soliciting inmates to get their families to subscribe to its services. Bee Aff., ¶11, Ex. A. Plaintiff purchases telephone network access in bulk, then issues telephone numbers to its subscribers. Bee Aff., ¶14. These telephone numbers encompass the calling areas local to the various DOCS facilities. Bee Aff., ¶14. Through remote call forwarding, plaintiff forwards calls placed to the numbers to other locations, id., Koberger Aff., ¶¶10-11, purportedly the actual location of the subscriber. Plaintiff admits that its telephone numbers are registered to accept third party telephone calls. Complaint, ¶4, and that it forwards calls to their ultimate destination. See October _ [sic], 2002, affidavit

of Salvatore S. Russo, ¶7.

8. DOCS had not previously encountered an enterprise which promises to deliver telephone services from inmates outside of the direct collect call system provided by the agreement between DOCS and WorldCom. Bee Aff., ¶12.

9. On September 13, 2002, DOCS management, security and legal staff had a telephone conference with plaintiff's President Brian Prins, operations manager Barbara Zapa and counsel Salvatore Russo. Bee Aff, ¶14. DOCS advised plaintiff that it was gathering information to make a determination as to what action it would take in response to plaintiff's service. Bee Aff., ¶14.

10. Plaintiff represented that it could provide DOCS with billing name and address (BNA) information regarding their subscribers names, addresses and other billing information. Bee Aff., ¶15. For the proposal to work, DOCS would have to be able to identify a given telephone number as owned by plaintiff. Id. Plaintiff provided DOCS with two telephone numbers which, it represented, would be registered as owned either by plaintiff or Paetec Communications, from whom it had obtained the numbers, and that the numbers would not show as unlisted. Bee Aff., ¶15. In addition to the two numbers provided by plaintiff, DOCS obtained information about four more of plaintiff's numbers as the result of plaintiff's billing dispute with WorldCom. Bee Aff., ¶16. The six numbers correspond to the six numbers identified in the complaint.

Compare Complaint, ¶3 with Bee Aff., ¶16.

11. Using the ordinary business practice of "reverse number lookup," DOCS attempted to obtain BNA data on each of plaintiff's six numbers and each came back as "error no match ... no data," that is unlisted with no record found. Bee Aff., ¶17 and Ex. B. There was no BNA information available for any of these telephone numbers and nothing identified them as associated with Outside Connections. Id.[1]

12. The lack of BNA data is a major security concern for DOCS. Under its agreement with DOCS, WorldCom is required to provide BNA data both in real time on-line data access and in a batch file transfer. Bee Aff., ¶17. Thus, even if approved numbers on inmate lists are unlisted, DOCS receives data about them from WorldCom. Id. The same is not true of plaintiff's numbers. Id.

13. When it is unable to obtain the BNA information or the identity of the owner of the telephone number, DOCS is unable to determine the destination of the telephone call. Bee Aff., ¶18. Knowing where a telephone call terminates and who receives the call is often essential in the investigation of criminal activity. Bee Aff., ¶19.

14. Plaintiff alleges that there are fewer security risks in its remote call forwarding setup than with ordinary call forwarding

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[1]Five of the numbers showed Paetec as the Local Exchange Carrier, which was not helpful because Paetec has customers other than Outside Connections.

because it controls the forwarding. However, the fact that it controls the forwarding is not the same as DOCS controlling the destination of the telephone call or WorldCom, with whom DOCS has a contractual relationship which was designed specifically to address DOCS security concerns. See Koberger Aff., ¶8; McLaughlin Aff., ¶¶7-8. Moreover, centralization is an important feature in monitoring and controlling inmate activity. McLaughlin Aff., ¶¶7-8. If DOCS were required to deal with companies like Outside Connections, it be ceding its duty to protect and control the inmates in its custody. Moreover, it would be unconscionable to require DOCS to accept at face value the assurances of plaintiff, or any provider of similar services, as to the integrity of its system and operation and DOCS simply does not have the financial resources to monitor operations like plaintiff's, as well as the 67,000 inmates in its care. McLaughlin Aff., ¶9.

15. Even if plaintiff established itself as a reliable entity, DOCS would have to spend enormous resources in obtaining data from it. There would have to be nightly data exchanges and continuous updates of databases as numbers on inmate lists changed. Alternatively, plaintiff would be required to provide DOCS with real time access to its database from a minimum of four DOCS locations. The setup would require computer hardware systems at each end, secure data transfer and DOCS would have to design extensive computer programs to make it all work. See Koberger

Aff., ¶¶13-14.

16. Moreover, even if plaintiff was able to provide DOCS with the necessary information about its subscribers, there are no assurances that other enterprises in the same business as plaintiff would be so cooperative. Bee Aff., ¶18. Further, DOCS would have to repeat the effort described in the previous paragraph with respect to each other enterprise similar to plaintiff's. See Koberger Aff., ¶15.

17. Because of these security concerns, on September 24, 2002, DOCS informed plaintiff by letter that it would not permit inmates to place on their approved lists telephone numbers that did not correspond to the area code and exchange of the address of the telephone owner. Bee Aff., Ex. C. If any such numbers were on the inmate lists, steps would be taken to block the calls. The prohibition applied, not only to plaintiff's telephone numbers, but to any similar operation as well. Id.

ARGUMENT.

I. STANDARD FOR PRELIMINARY INJUNCTION.

18. In order to obtain a preliminary injunction against a government actor, a party must generally show a prospect of irreparable harm and a likelihood of success on the merits. Velazquez v. Legal Services Corp., 164 F.3d 757, 763 (2d Cir. 1999). However, where plaintiff seeks to alter, rather than merely preserve, the status quo, it must make a clear showing of a

likelihood of success. Brewer v. West Irondequoit Cent. School Dist., 212 F.3d 738, 744 (2d Cir. 2000). Because plaintiff seeks to reverse the effect of DOCS order to block its telephone numbers, it is asking to alter the status quo and, so, must make a clear showing that it is likely to prevail.

II. INMATES AND THEIR FAMILIES HAVE ONLY LIMITED RIGHTS TO TELEPHONE COMMUNICATIONS.

19. Plaintiff does not allege a violation of any constitutional right. However, an examination of cases the constitutional claims of inmates and their families regarding access to telephone service is important for understanding that courts are required to give substantial deference to prison policies governing inmate telephone access.

> Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations of the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to the effective discharge of these duties are too complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly in the province of the legislative and executive branches of the government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

> Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. 396, 404-05 (1971) (footnotes omitted).

20. The problems faced by prison administrators include balancing the need to provide inmates telephone contact with the outside world, particularly their families and attorneys, with the dangerous potential of abuse in inmate use of telephones.

> The dangers of unrestricted telephone access include acquiring merchandise by fraud, promoting drug violations, soliciting murder, harassing crime victims, witnesses and public officials, facilitating escape plots, violating court restraining orders, and threatening domestic violence.

Gilday v. Dubois, 124 F.3d 277, 280 (1st Cir. 1997).

21. Thus, the deference ordinarily accorded by courts to prison officials extends to the operation of prison system's telephone service.

> [A]n inmate "has no right to unlimited telephone use." Benzel v. Grammar, 869 F.2d 1105, 1108 (8th Cir.), cert. denied, 493 U.S. 895, 107 L.Ed.2d 194, 110 S.Ct. 244 (1989), citing Lopez v. Reyes, 692 F.2d 15, 17 (5th Cir. 1982). Instead, a prisoner's right to telephone access is "subject to rational limitations in the face of legitimate security interests of the penal institution." Strindberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986). "The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions." Fillmore v. Ordonez, 929 F.2d 1544, 1563-64 (D. Kan. 1993), aff'd, 17 F.3d 1436 (10th cir. 1994), and citing Feeley v. Sampson, 570 F.2d 364, 374 (1st Cir. 1978), and Jeffries v. Reed, 631 F.Supp. 1212, 1219 (E.D. Wash. 1986).

Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994).

22. As a result, courts have repeatedly sustained prison telephone systems which require inmates to place collect calls through one service provider, per statewide system or per prison facility, to a limited number of friends, family members and attorneys. See, e.g., Arsberry v. State of Illinois, 244 F.3d 558, 564-65 (7th Cir. 2001); Arney v. Simmons, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998); Levingston v. Plummer, 1995 U.S. Dist. LEXIS 696, *3 (N.D. Cal. Jan. 9, 1995); Allen v. Josephine County, 1993 U.S. Dist. LEXIS 276, *20 (D. Or. Sep. 26, 1994). Indeed, as the Federal Communications Commission (FCC), the agency in the best position to know, has pointed out, "most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions." Matter of Implementation of Telephone Reclassification Provisions of the Telecommunications Act of 1996, 17 FCC Record 3248, 3276 (Feb. 21, 2002).

23. The fact that the recipient of collect calls placed by inmates through these systems pay allegedly "exorbitant" high rates because of the lack of competition does not raise constitutional concerns. Arsberry, 244 F.3d at 564-65; Allen, 1993 U.S. Dist. LEXIS 276 at *3; Wooden v. Norris, 637 F.Supp. 543, 543 (M.D. Tenn. 1986).

III. DOCS'S DECISION TO ASK WORLDCOM TO PLACE BLOCKS ON PLAINTIFF'S PHONE NUMBERS WAS REASONABLY RELATED TO LEGITIMATE PENALOGICAL INTERESTS.

24. As discussed, restraints on the use of telephones by prisoners are valid if they are reasonably related to legitimate penalogical interests. See Washington, 35 F.3d at 1100. The dangers of call forwarding are well known. For example, in United States v. Diwan 864 F.2d 715, 717 (11th Cir. 1989), the court sustained a conviction for conspiracy to persuade a minor to engage in sexually explicit conduct for the purpose of producing child pornography. The defendant forwarded the telephone calls of an inmate serving a 28 year sentence for performing lewd acts with a child, thereby allowing the inmate to speak with the minors directly.

25. As recognized by one court, rules prohibiting inmates from participating in conference calls or using call forwarding are needed because call fording technology enables

> inmates to engage in fraud, harassment and other nefarious, even criminal, activity and that some have been known to take full advantage of these opportunities. It is equally clear that the Department has a responsibility to prevent such abuses.

Langton v. Hogan, 1995 U.S. Dist. LEXIS 2900, *4 (D. Mass. 1995), aff'd, 71 F.3d 390 (1st Cir. 1995).

26. DOCS was not required to wait until a call to one of plaintiff's numbers resulted in a crime before it acted. Nor, is it relevant that plaintiff may not be complicit in any illicit

activity between inmates and those they call. DOCS is entitled to act on the risks of the technology. Regulations expressly forbid forwarded telephone calls. 7 NYCRR §§280.2 (Rule 121.11), 723.3(e)(11). DOCS determined that plaintiff, or any similar operation, which buys or leases telephone numbers itself and sells or leases them to third parties for use in remote locations employs call forwarding. See Bee Aff., Ex. C. It is not a defense to the regulation that the telephone call did not result in criminal activity or the receipt of the telephone call by an unauthorized party any more than the lack of an accident is a defense to the offense of speeding in a motor vehicle.[2]

27. "There does not have to be sufficient proof in the record that inmate telephone use has actually led to an escape plot, fraud, or violence." Arney, 26 F.Supp.2d at 1294 (citing Turner v. Safely, 482 U.S. 78, 93 (1987)).

> "Responsible prison officials must be permitted to take reasonable steps to forestall . . . threats to security, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." . . . The "informed discretion of prison officials that there is a potential danger may be sufficient for limiting rights even though this showing might be unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of

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[2]The Court must defer to DOCS's interpretation of its own state law regulation. See United States v. Consumer Life Ins. Co., 430 U.S. 725, 751-52 (1977). Although, plaintiff's kind of business operation is new, DOCS determined that it would apply this interpretation to all similar operations and plaintiff failed to avail itself of a state court judicial interpretation of it by bringing an action under NY CPLR chapter 78.

the general public.

Arney, 26 F.Supp.2d at 1294 (quoting Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33 and n. 9 (1977)).

28. Plaintiff's complaint asks for this Court to interfere with the safe and secure operations of the prisons of New York state. As discussed in the fact summary above, DOCS has legitimate security concerns about plaintiff's operation in particular and generally in the type of remote call forwarding arrangement in which plaintiff engages. Despite these concerns, plaintiff seeks to enjoin the blocking of its telephone numbers and to enjoin DOCS from refusing to approve of the placement of its telephone numbers on inmate calling lists as well. This is a direct interference with the operation of New York prisons.

IV. WORLDCOM COULD BE IN BREACH OF ITS CONTRACT WITH DOCS IF IT FAILS TO HONOR THE REQUEST TO BLOCK OUTSIDE CONNECTIONS' TELEPHONE NUMBERS.

29. WorldCom is DOCS's agent for the purpose of carrying out its orders to place the blocks. See A.T.&T v. City of New York, 1994 U.S. Dist. LEXIS 17456, *10 (S.D.N.Y. Dec. 7, 1994). "Far from being mere agents of the phone companies, the prisons are in the driver's seat because it is they who control the access to the literally captive market constituted by the inmates." Arsberry, 244 F.3d at 566.

30. DOCS has made a determination that telephone calls made

through Outside Connections' numbers are forwarded calls in violation of regulations. Bee Aff., Ex. C. As a result, WorldCom's contract with DOCS requires it to honor the request to place blocks on the numbers and failing to do so may be regarded as a breach of contract. Koberger Aff., ¶18.

IV. PLAINTIFF'S ANTI-TRUST CLAIMS FAIL UNDER THE STATE ACTION DOCTRINE.

31. Plaintiff alleges that defendants blocked its telephone numbers in violation of the Sherman Act, 15 U.S.C. §1, which prohibits combinations in restraint of Trade, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26, which provide causes of action for damages and injunctive relief respectively for certain anti-trust violations.

32. However, actions of the state are immune from liability under both the Sherman and the Clayton Acts. Cine 42nd Street Theater Corp. v. The Nederlander Org., Inc., 790 F.2d 1032, 1038-40 (2d Cir. 1986). This immunity is based on the principle that "state economic regulation should not be pre-empted by federal antitrust laws without explicit evidence that such is Congress' will." Id., 790 F.2d at 1039.

33. In order for the actions of a state agency to be immune under the state action doctrine, the agency must identify a "'clearly expressed state policy' that authorizes its actions." Cine 42nd Street, 790 F.2d at 1043. "So long as the resulting anticompetitive activities are a foreseeable consequence of the

state delegation, the 'clear articulation' standard has been met." Id.

34. New York Corrections Law §5 creates the Department of Correctional Services (DOCS) and makes a commissioner of corrections its chief executive officer. Corrections Law §112 delegates to the commissioner the authority to manage and control DOCS facilities and to make rules and regulations governing them. Corrections Law §137(2) gives the Commissioner the authority to make appropriate rules for the safety, security and control of correctional facilities. Thus, under New York law,

> Correction Law §112 and 137 give the Commissioner broad discretion in the implementation of policies relating to fiscal control and management of correctional facilities and to security and inmate discipline . . . . A court should defer to the Commissioner's interpretation of his authority as long as it is reasonably related to legitimate penalogical interests.

Matter of Allah v. Coughlin, 190 A.D.2d 233, 236, 599 N.Y.S.2d 651, 653 (3d Dept. 1993).

35. Pursuant to this broad grant of authority, the Commissioner has promulgated the regulations governing the use by inmates of DOCS's collect-call only "call home" system. 7 NYCRR chap. 723. These regulations specifically prohibit call forwarding. 7 NYCRR §723.3(d)(11). DOCS cited this prohibition in having WorldCom block telephone calls placed to numbers leased from plaintiff. Bee Aff., Ex. C.

36. Courts have specifically held that the single provider

telephone systems of prisons and jails are exempt from the antitrust laws under the state actions doctrine. See, e.g., Arsberry, 244 F.3d at 566 (Illinois prisons); Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 536 (6th Cir. 2002) (Detroit jails).

37. State action immunity extends to WorldCom. See Arsberry, 244 F.3d at 566; Michigan Paytel, 287 F.3d at 536. DOCS directed it to place the blocks and could have regarded it as in material breach of its contract had it not done so. See Koberger Aff., ¶18.

38. As discussed in the facts summary above, DOCS ordered the blocking of Outside Connections lines primarily for security reasons. It also was concerned about the costs which would have to be incurred by daily analysis of information received from Outside Connections and enterprises like it. See Koberger Aff., ¶¶13-15. It is inconceivable that Congress intended the federal antitrust statutes to be used as a means of allowing a private enterprise to interfere with the security operations of a state prison system or to justify a court's second guess about whether a state corrections agency's security concerns, including the costs involved in addressing them, are justified.

39. Even if true, which it is not, plaintiff's allegation that DOCS's interest in blocking Outside Connections's telephone lines is merely pecuniary does not overcome state action immunity. As explained by Judge Posner in speaking for the Seventh Circuit:

> States and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the "somehow" is not the business of the federal courts unless a specific federal right is infringed. Nor do the persons with whom the state contract violate the antitrust laws by becoming state concessionaires, provided those persons do not collude among themselves or engage in other anticompetitive behavior, of which charging high prices as a state concessionaire is not a recognized species.

Arsberry, 244 F.3d at 566.

40. Plaintiff has not alleged that any state actor blocked its telephone numbers for personal gain, nor could he have since plaintiff has named no individual state defendants.

V. DEFENDANTS HAVE NOT VIOLATED THE TELECOMMUNICATIONS ACT OF 1996.

41. Plaintiff's claim that a provision of the Telecommunications Act of 1996, 47 U.S.C. §§251 and 252 applies is meritless. Pertinent to plaintiff's claim, section 251 imposes competitive restrictions on local exchange carriers. Section 252 provides for interconnection agreements between competitors for local services and gives state utilities commissions the authority to review them. DOCS is neither a local exchange carrier nor a regulatory commission, but a customer of telephone service. See Arsberry, 244 F.3d at 566.

42. A.T.&T. Corp. v. Iowa Utilities Board, 525 U.S. 366, 370, 378 (1999), did not give plaintiff a cause of action, but merely sustained the FCC's authority to regulate purely local telephone service which had not been federally regulated prior to the passage

of the Act. However, the FCC has repeatedly held that the special needs of prisons generally requires exemption from the competitive requirements of the laws it regulates.

A. The FCC Has Repeatedly Ruled That Prison Telephone Systems Are Exempt From Laws And Regulations Requiring Competition In The Provision Of Telephone Service.

43. Plaintiff contends that the FCC has described prison telephone service relationships such as that between DOCS and WorldCom as monopolistic. However, far from characterizing these arrangements as "perverse," as plaintiff claims, the FCC has repeatedly recognized that they were necessary given the unique security concerns of prison systems and, therefore, exempt from most of the regulations calling for competition in the provision of telephone services.

44. The FCC has repeatedly refused to apply regulations which govern the blocking of telephone services by aggregators who make telephones available for use by the public. Thus, in Matter of Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, 11 FCC Record 4532, 4532 (1996), the FCC concluded that correctional agencies were not "aggregators" subject to rules governing call blocking and other regulations which apply to those who make telephones available to the public. The FCC specifically concluded that "neither TOCSIA[3] nor our rules require

[3]TOSCIA is the Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. §226. It authorizes the FCC

telephones for use only by prison inmates to be unblocked" with regards to telephone service providers other than those with whom the prison agency contracts. Id., 11 FCC Record at 7301. As a result, callers from prisons "are generally unable to select the carrier of their choice: ordinarily they are limited to the carrier selected by the prison." Id. Moreover, prison systems are also permitted to block calls which raise security concerns.

> For example, prisons may need to block inmate calls to judges, jurors, witnesses, or others. In fact, prisons may need to limit inmate calls to a set of pre-approved numbers.

Id., 11 FCC Record at 7301 n. 125.

45. As recently as February 2002, the FCC reiterated that prison systems are generally exempt from FCC rules which restrict the blocking of telephone calls. Matter of Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 17 FCC Record 3248, 3282 (2002).

We recognize that the provision of inmate calling

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to issue rules which protect consumers from deceptive practices in the placement of interstate operator assistance telephone calls. Payphones and hotels are examples of telephone services covered by the Act. See 11 FCC Record at 7278-79. TOSCIA was enacted to, among other things, regulate the practice of "aggregators", the telephone owners, to block "dial around" calls. This is the practice of a caller dialing a number to access a service of a provider other than the one with whom the aggregator contracts. The calls were blocked because the aggregators and their contracted service providers lost commissions when callers used competing services. Thus, although TOSCIA requires aggregators to permit dial around calls, the FCC has issued regulations which entitle them to be compensated by the competing service provider. Id., 11 FCC Record at 7279.

> services implicates important security concerns and, therefore, involves costs unique to the prison environment. . . . A prison payphone provider typically is contractually obligated to monitor and control inmate calling to prevent abuse and ongoing criminal activity and to assist in criminal investigations. Correctional facilities must balance the laudable goal of making calling services available to inmates at reasonable rates, so that they may contact their families and attorneys, with necessary security measures and costs related to those measures. For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions. Thus, legitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling.

Id., 17 FCC Record at 3276 (emphasis added). Moreover, the FCC expressly recognized the legitimate security interest of prohibiting "a scheme to evade calling restrictions via call-forwarding or three-way calling." Id., 17 FCC Record at 3252.

46. The exceptions to the FCC's general refusal to regulate the provision of telephone service to prison inmates merely prove the rule that competition is not required. Thus, the FCC has concluded that although 47 U.S.C. §276 expressly applies to prison telephones, its requirement that payphone service providers are fairly compensated for their services must be addressed in light of the non-competitive nature of prison telephone service. 17 FCC Record at 3252. In addition, the FCC has imposed disclosure requirements on operator service providers, i.e., the telephone companies, which provide prison telephone service because they mitigate the effects of the non-competitive telephone systems

allowed, by law, in the prison setting. See Matter of Billed Party Preference for InterLATA C+ Calls, 13 FCC Record 6122, 6157 (Jan. 29, 1998). In sum, the FCC has never used its regulatory authority to force correctional agencies to enter into ongoing relationships with private for profit enterprises, which is exactly what plaintiff is asking this Court to do.

47. Plaintiff argues that it is merely attempting to allow families of inmates to avoid the unfair high rates permitted by DOCS agreement with WorldCom. However, as discussed more fully in WorldCom's papers, the rates charged under the Call Home Program have been filed and approved by the FCC and are not subject to challenge in a court under the filed rate doctrine. See Arsberry, 244 F.3d at 566-67.

48. In sum, because the FCC has repeatedly refused to require competition in providing telephone service to prisons, this Court may not do so here.

B. DOCS Is Neither A Local Exchange Carrier, Nor A State Regulatory Commission, So 47 U.S.C. §251(c) Does Not Apply To It.

49. Plaintiff alleges that DOCS has violated its rights as a local exchange carrier under 47 U.S.. §251(c) of the Telecommunications Act of 1996. That provision requires incumbent local exchange carriers to enter into interconnection agreements with other local exchange carriers in order to allow the latter to compete. A "local exchange carrier" is a "person" who provides

"telephone exchange service" or "exchange access." All of these terms are defined in 47 U.S.C. §153 and do not include state government agencies.[4] A state prison authority is not a "person" within the meaning of the telecommunications act because it is not "an individual, partnership, association, joint stock company, trust or corporation." 47 U.S.C. §153(32). See Miranda v. State of Michigan, 168 F.Supp.2d 685, 692 (E.D. Mich. 2001) (state not a person within meaning of Telecommunications Act). See also Arsberry, 244 F.3d at 566 (prisons effectively customers of telephone service providers).[5]

50. MCI Telecommunications Corp. v. Illinois Bell Telephone Corp., 222 F.3d 323 (7th Cir. 2000), does not allow a cause of action against a state prison agency. In that case, the Seventh Circuit held that an action could be brought against Illinois' public services commission on the grounds that by performing a regulatory function in passing on an interconnection agreement between two service providers under 47 U.S.C. §252, the commission

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[4]Whether plaintiff is a local exchange carrier depends on information in its possession and DOCS puts plaintiff on its proof for that assertion.

[5]Even if DOCS or WorldCom could conceivably be regarded as local exchange carriers, it is not reasonable to believe that the FCC would depart from its longstanding policy of exempting prison telephone systems from the competition requirements of the statutes it administers. If the FCC exempts prison systems from rules requiring competition among collect call service providers, it is not reasonable to believe, as plaintiff requires, that the FCC would require prisons to allow competition among local service providers for inmate phone calls.

had waived the state's Eleventh Amendment immunity. Id., 222 F.3d at 343. The state utility agency's actions were subject to review because it voluntarily stood in the shoes of a federal regulatory agency. See id., 222 F.3d at 343 (state "now regulating on behalf of Congress").

51. In this case, DOCS acted as a customer, not a regulator.[6] In MCI Telecommunications, the Seventh Circuit made clear that the state does not waive its immunity merely "if it engages in a regulated enterprise." Id., 222 F.3d at 340 (discussing College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999). Under this standard, DOCS cannot have waived its Eleventh Amendment immunity merely by permitting telephone service to those in its custody while exercising its public duty of ensuring that the service is not abused. Congress could not have intended the Telecommunications Act to permit federal interference with the telephone service offered to state correctional inmates and plaintiff's papers do not cite a single case so holding.

52. Alternatively, the Seventh Circuit in MCI, 222 F.3d at 345, concluded that the officers of a state utility commission could be subject to a suit involving the same issues under the doctrine of Ex Parte Young, 209 U.S. 123 (1908), which permits individual state officers to be sued for injunctive relief in their official

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[6]Indeed, in Arsberry, 244 F.3d at 566, a later case, the same Seventh Circuit described a correctional department as a customer for telephone service.

capacity for violations of state law. However, Young doctrine does not permit suits against state agencies themselves, see Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 71 n. 10 (1989), and nothing in MCI Telecommunications suggests that Young doctrine suits are permissible against an agency directly. At any rate, because plaintiff has not fairly alleged a violation of federal law, he has no claim even against the Commissioner of DOCS.

VI. THE DONNELLY ACT DOES NOT APPLY TO CONTRACTS IN INTERSTATE COMMERCE.

53. Plaintiff also attempts to state a claim under NY General Business Law §340, the Donnelly Act, which is a state law version of the Sherman Act. This claim also fails on its face for several reasons.

54. The Donnelly Act only applies to wholly intrastate contracts or agreements because federal antitrust laws preempt state laws where interstate commerce is involved. See In re Wiring Device Antitrust Litigation, 498 F.Supp. 79, 84 (E.D.N.Y. 1980); Fleet-Wing Corp. V. Pease Oil, 29 Misc.2d 437, 440, 212 N.Y.S.2d 871, 876 (Sup. Ct., N.Y. County 1961). Since inmates may place interstate telephone numbers on their lists should friends or family reside out of state, the contract between DOCS and WorldCom is interstate.

55. The Donnelly Act prohibits conspiracies among competitors in restraint of trade. Creative Trading Co. v. Larkin-Pluznick Larkin, Inc., 75 N.Y.2d 830, 830, 552 N.Y.S.2d 558, 558 (1990), adopting dissenting opinion in, 148 A.D.2d 352, 354, 539 N.Y.S.2d

1, 4 (1st Dept. 1989). DOCS is WorldCom's customer, not its competitor.

CONCLUSION

For the forgoing reasons, plaintiff's motion for a preliminary injunction must be denied.

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Respectfully submitted,

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